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No. 80-1924

In the Supreme Court of the United States

OCTOBER TERM, 1980

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

ANTHONY M. ROSSI, ET AL., RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

	Page
Introductory Statement	1
Reasons for Denying the Petition	2
Conclusion	9
Appendix A	1a
Appendix B	3a

TABLE OF AUTHORITIES

Cases:

New York v. Train, 494 F.2d 1033 (D.C. Cir. 1974), *aff'd* 420 U.S. 35 (1975)	5
NLRB v. E.C. Atkins & Co., 331 U.S. 398 (1947)	6
NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760, 377 U.S. 58 (1964)	4
Philbrook v. Glodgett, 421 U.S. 707 (1975)	4
Potomac Electric Power Co. v. Department of Labor, 49 U.S.L.W. 4063 (Dec. 15, 1980)	4
United States v. Nixon, 418 U.S. 683 (1974)	8
Zwiebon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975), *cert. denied* 425 U.S. 944 (1976)	8

Constitution, treaties, statutes and executive agreements:

Pub. L. No. 92-129, Section 106, 85 Stat. 355, codified at 5 U.S.C. 7151 note	2

Miscellaneous:

5 C.F.R. §8 (1980)	6
5 C.F.R. §301 (1980)	6
117 Cong. Rec. (1971):	
p. 16,126	5
p. 16,132	5
H.R.Rep. No. 433, 92d Cong., 1st Sess. (1971)	4
Manila Times Journal (Aug. 14, 1976)	7
S.Rep. No. 92-93, 92d Cong., 1st Sess. (1971)	2

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INTRODUCTORY STATEMENT

Counsel, on behalf of respondents Anthony M. Rossi, *et al.*, oppose the granting of a writ of certiorari in this case for the reasons set out below.

Respondents generally concur with the facts as presented in the statement of the case by the Petitioner (hereinafter "the Government"). This brief in opposition will not attempt to summarize the arguments made before the Court of Appeals nor the decision by the court below. However, respondents will seek to narrowly reply to a few key points raised by the petition of the Government which respondents respectfully hope will aid this Court in acting on said petition.

REASONS FOR DENYING THE PETITION

Despite a unanimous Court of Appeals decision and not a single vote for rehearing,[1] the Petitioner continues to advance a contorted view of the Hughes-Schweiker Amendment,[2] (hereinafter "the Amendment") which would totally frustrate the intent of Congress. The legislative history directly indicates that the Amendment was intended to provide "that the Department of Defense cannot discriminate against American citizens or their dependents in employment on military bases."[3] The only substantial argument raised by the Government's petition alleges adverse foreign policy implications from the Court of Appeals decision,[4] an argument which is legally irrelevant and factually unsupported. The thrust of the Government's argument in this regard is more properly addressed to Congress rather than this Court.[5] For these reasons more fully articulated below, the petition should be denied.

At this juncture, this case involves solely a matter of statutory construction. The Court of Appeals was fully briefed by the parties on all issues raised in the

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[1] Petitioners' Appendix at 49a.

[2] Act of September 28, 1971, Pub. L. No. 92-129, §106, 85 Stat. 348, 355 (codified at 5 U.S.C. §7151 note (1976)). The provision was sponsored by Senators Hughes and Schweiker as an amendment to the Selective Service Act Amendments of 1971.

[3] S. Rep. No. 92-93, 92d Cong., 1st Sess. 23 (1971).

[4] Petition at 20-22

[5] *See infra* at 6-8.

petition before this Court and unanimously rejected the interpretation advanced here by the Government. Since all preferential hiring of local nationals at the time Congress considered the Amendment was done under executive agreements, the Court of Appeals concluded:

> [I]f we were otherwise to construe the term [treaty] to encompass all international agreements, the exception to the ban on discrimination virtually would engulf the general rule.[6]

Under the novel construction argued here by the Government, it is virtually impossible to envision the goals Congress intended to serve by passing the Amendment.[7]

The legislative history of the Hughes-Schweiker Amendment was discussed in the Court of Appeals decision[8] and need not be reiterated here. The conference committee report referred to the provision, originated as a Senate floor amendment by Senators Hughes and Schweiker, as "prohibiting job discrimination against American citizens and their dependents in hiring in United States military bases in

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[6] Court of Appeals decision at 17, Petitioners' Appendix 18a.

[7] One has difficulty determining what evil Congress was addressing if not executive agreement-foisted preferential hiring. The Government earlier advanced the argument that the provision was directed solely against the unilateral actions of local commanders, a view guardedly endorsed by the District Court (467 F. Supp. 960, 967, n.4) and rejected by the Court of Appeals (Petitioners' Appendix 15a).

[8] Court of Appeals decision at 9-17, Petitioners' Appendix 9a-18a.

any foreign country."[9] If there is any canon of construction which is entitled to special weight by the courts, it is the principle that statutes ought to be construed to achieve the purpose Congress intended.[10] Extension of the term "treaty" in the Hughes-Schweiker Amendment to encompass executive agreements *would exempt every preferential hiring arrangement in existence at the time of passage of the bill.*[11] Such a result made no sense to the Court of Appeals and should not be seriously entertained by this Court.

The legislative history specifically refers to the problem of preferential hiring done by international agreements and these references, when added to the obvious purpose of the bill, are compelling support for the Court of Appeals decision.[12] The most notable statement was made by Senator Hughes:

> Those in the lowest ranks cannot have their wives obtain anything but a tourist visa. They are disqualified from helping themselves. And

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[9] H.R. Rep. No. 433, 92d Cong., 1st Sess. 31 (1971).

[10] *Potomac Electric Power Co. v. Department of Labor,* 49 U.S.L.W. 4063 (1980); *Philbrook v. Glodgett,* 421 U.S. 707 (1975).

[11] *See* Court of Appeals decision at 13, Petitioners' Appendix 13a.

[12] Respondents will not repeat the several references in floor debates, which were detailed in their appellate brief at 19-23 and are discussed in the Court of Appeals decision. Petitioners' Appendix 14a. Statements of legislative sponsors have been recognized by this Court as entitled to great weight in ascertaining intent. *See e.g. NLRB* v. *Fruit & Vegetable Packers & Warehousemen Local 760,* 377 U.S. 58, 66 (1964).

> they are denied the opportunity to work on overseas bases, *by agreement with the countries in which they are located,* and are forced to live in poverty.[13]

Elsewhere Senator Schweiker read into the record during the same floor debates a statement referring to base jobs as being "*classified as local national jobs and American dependents cannot fill the jobs because of their classification.*"[14] Indeed, all the preferential hiring then occurring was due to executive agreements, such as the Base Labor Agreement of 1968 (hereinafter "BLA"), which so classified the jobs.[15]

Against this very cogent and clear legislative history,[16] the Government's petition only confuses the issue. The petition first suggests that Senator Hughes' reference to agreements was to "visa status of American military dependents,"[17] but then concludes:

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[13] 117 Cong. Rec. 16,126 (1971), cited in Court of Appeals decision, Petitioners' Appendix 14a. (Emphasis added)

[14] 117 Cong. Rec. 16,132 (1971), cited in Court of Appeals decision, footnote no. 29., (Petitioners' Appendix 14a-15a) (Emphasis added).

[15] *See* Article I, Section 1, Petitioners' Appendix 51a.

[16] The presence of lengthy passages in the legislative history dealing with other issues (Petition at 15) is, of course, irrelevant. *Cf. New York* v. *Train,* 161 U.S. App. D.C. 114, 494 F.2d 1033, 1039 (1974), *aff'd* 420 U.S. 35 (1975) (relying on several passages by the bill sponsors in a 1700 page legislative history).

[17] Petition at 16.

> Senator Hughes' statement thus is irrelevant to the problem addressed by Section 106 and sheds no light on the proper interpretation of the word 'treaty.'[18]

This position is based upon a serious misconception: work permit visas from host governments for Americans are *not* required for jobs on American bases overseas.[19] The Senators were referring to the visa problem only to demonstrate that the dependents could not get jobs in the *local economy,* a fact which added to their plight. Moreover, the classification of the jobs as "local national" positions was also specifically raised in the same floor debates.[20]

The final position asserted by the Government's petition is that the decision below "will hamper the United States' ability to negotiate for and maintain base rights and other military advantages in the Philippines and elsewhere."[21] Respondents believe that this assertion is wholly inaccurate and, even if it were not, should be viewed by this Court as legally irrelevant. The Government is free to submit any new or existing arrangement to the Senate for

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[18] *Id.* at 17.

[19] Jobs in U.S. installations overseas are U.S. Civil Service jobs, not jobs in the local economy. *Cf.* 5 C.F.R. Parts 8 and 301 (1980). A request by counsel to the Department of Defense for all DOD instructions on "employment of military and civilian personnel stationed in foreign areas" for the period 1961-74 yielded no documents referring to any work permit requirements for jobs at these U.S. bases. (This Court can take judicial notice of the content of DOD circulars and instructions. *NLRB* v. *E.C. Atkins & Co.*, 331 U.S. 398 (1947)).

[20] *See* note 14, *supra.*

[21] Petition at 21.

ratification as a "treaty."[22] If the status of bases were really involved, this would be the prudent and proper course of action—not appeals to this Court which rely solely on newspaper editorials for support.[23]

There is compelling evidence that the preferential hiring arrangements in the Philippines were contemplated for submission to the Senate in the last series of negotiations.[24] Concern of several Senators for the impact of this practice on dependents was met by the Government's recitation of anticipated treaty ratification of the hiring arrangements in the Philippines.[25] For the Government to now raise in

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[22] Indeed, since this case arose, the Government has already reneged on representations to Congress that the BLA preferential hiring provisions would be submitted as a treaty for ratification by the Senate. *See* note 25, *infra*.

[23] Petition at 21. On August 14, 1976, the *Manila Times Journal* carried a story about the Filipino Civilian Employees Association calling for the "abrogation of the labor agreement." Obviously, it is difficult to make law out of the newspapers.

[24] The Department of Defense told a House Appropriations subcommittee in 1977 that a "new agreement, when finalized, will be submitted to the Senate for ratification." (Attached hereto as Appendix A).

[25] *See* Attachments Two through Five to Plaintiffs' Opposition to Defendants' Cross-motion for Summary Judgment, filed February 26, 1979. Senator Morgan, for instance, was advised that "[t]he finalized treaty, which will require ratification by the Senate, should resolve the question as to whether preferential employment of Filipinos is to continue." Letter from E.B. Riley, Acting Director of Personnel Management Division, Department of Defense, dated July 15, 1977. (Attached hereto as Appendix B).

this Court the policy arguments it should have presented to the Senate is highly inappropriate.[26]

Finally, it should be stressed that the sort of vague assertion of foreign policy and national security implications made by the Government is legally irrelevant.[27] The Government itself in the District Court noted that "it would be improper for this court to serve as a forum for foreign policy debate."[28] There are obviously mechanisms, besides granting certiorari, for taking into account the legitimate foreign policy effects of the decision below.[29] This Court is plainly the wrong forum for such assertions.

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[26] The Government is always free to submit the BLA or any other agreement to the Senate. Its failure to do so should silence its representations that important foreign policy considerations exist.

[27] *Cf. United States* v. *Nixon*, 418 U.S. 683, 704 (1974); *Zweibon* v. *Mitchell*, 170 U.S. App. D.C. 1, 516 F.2d 594 (1975) *cert. denied* 425 U.S. 944 (1976).

[28] Defendants' Objections to Plaintiffs' Motion for Issuance of Letters Rogatory at 2. The Government repeatedly opposed discovery on foreign policy grounds, asserting that the matter before the court was a "purely legal issue." Defendants' Objections to Plaintiffs' Document Requests at 1-2. *See also* Defendants' Opposition to Motion to Compel Depositions of Messrs. Oakley, Teare and Monjo.

[29] Prospective practices could be submitted to the Senate for ratification and retroactive relief is equitable in nature and need not involve "bumping" of local nationals.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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JUNE 18, 1981

APPENDIX A

House Appropriations Committee
Subcommittee
Hearing Transcript, , 1977
Page , following line

Practices and Policies in the Hiring of Foreign National Employees

1. The Department of Defense has a base labor agreement with the Government of the Philippines which provides preferential employment opportunities for Philippines. The GAO in report #B-182312 has concluded that this section is contrary to existing law. The existing law (P.L. 92-129) or 5 U.S.C. 7151, makes it illegal for the Department of Defense to discriminate against persons who are citizens of the U.S. or are dependents of members of the armed forces of the U.S. with respect to employment. Since the base labor agreement under discussion has not been ratified by the Senate as a treaty, the Department of Defense is violating current law. What steps has the Department taken to rectify this situation?

Answer: It is the opinion of the Department of Defense that the Base Labor Agreement between the United States and the Philippines dated May 27, 1968, constitutes a treaty as that term is used in Section 106 of Public Law 92-129 of September 28, 1971. Therefore, the provisions of the statute would not apply to the Agreement. The General Counsel of the Department of Defense outlined this position in his letter to the Assistant

General Counsel of the General Accounting Office dated June 21, 1975. This information was brought to the attention of the GAO in response to their request for DoD comments on report #B-182312.

Negotiations between the U.S.G. and GOP were begun in June 1976 on a new bases agreement. This new agreement, when finalized, will be submitted to the Senate for ratification.

Office of Origin: ODASD(CPP)/M&RA
Action Officer: William F. Coakley
Date Prepared: February 17, 1977
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UNCLASSIFIED

APPENDIX B

Senator Robert B. Morgan
United States Senate
P.O. Box 2719
Raleigh, NC 27602

Dear Senator Morgan:

This is in further response to your letter of 3 June 1977 to the chief of Legislative Affairs on behalf of Ms. Shirley A. Ward. Ms. Ward has written you concerning her inability to obtain employment at the Naval Regional Medical Center in the Philippines.

The Commanding Officer of the Center has advised us that the Base Labor Agreement with the Republic of the Philippines provides for preferential employment of Filipino nationals and precludes the hiring of Ms. Ward by the Center. The Center neither employs nor is authorized any positions for U.S. Civil Service employees who are U.S. citizens.

The issue with which you and Ms. Ward are concerned is one that cannot be resolved at the local activity level. This matter is under study as a part of the treaty concerning the Military Bases Agreement currently being negotiated between the United States and Philippine governments. The finalized treaty, which will require ratification by the Senate, should resolve the question as to whether preferential employment of Filipinos is to continue.

We have been further advised that Ms. Ward has been employed since 31 May 1977 by the U.S. Naval Ship Repair Facility as a Security Clerk (Typing) GS-301-4. Her appointment is temporary, however, and will expire on 28 August 1977.

Your interest in this matter is appreciated and it is hoped that the above information will be of assistance.

Sincerely,

E. B. Riley
Acting Director
Personnel Management Division

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